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CASE

No. 878

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

Appeal from

The Court of Appeals of Logan County, Ohio

HAROLD C. FOREMAN and EDITH L. FOREMAN

Appellants

vs.

THE CITY OF BELLEFONTAINE

Appellee

APPELLANTS' PETITION FOR REHEARING

HAROLD C. FOREMAN and EDITH L. FOREMAN
124 E. Spring Ave.
Bellefontaine, Ohio

Appellants, In Propria Persona

JAMES B. WEST
126½ South Main St.
Bellefontaine, Ohio

City Solicitor and Attorney for Appellee

CIVIL ACTION No. 878

IN THE SUPREME COURT OF THE UNITED STATES

HAROLD C. FOREMAN and EDITH L. FOREMAN
Husband and Wife
124 E. Spring Ave.
Bellefontaine, Ohio

Appellants

vs.

THE CITY OF BELLEFONTAINE
Bellefontaine, Ohio

Appellee

APPELLANTS' PETITION FOR REHEARING

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petition of Harold C. Foreman and Edith L. Foreman for rehearing on treating the appeal papers herein from the Court of Appeals, Logan County, Ohio, as an application for writ of certiorari is submitted pursuant to Rule 58 (2). R

The opinion by the Court dismissing appellants' appeal was entered on April 29, 1963, October Term.

The grounds in support of appellants' petition for rehearing are as follows:

1. The said judgment by the lower courts had the effect of taking appellants' property without due process of law, and without due course of law and denied appellants the equal protection of the laws, as prohibited by the Fourteenth Amendment to the Constitution of the United States, and Article I, Section 16, Ohio Constitution.

2. It denied appellants the right of trial by jury, as guaranteed by the Seventh Amendment to the Constitution of the United States and Article I, Section 5, Ohio Constitution.

3. It gave retroactive effect to Section 713.15, of the Revised Code of Ohio, in violation of Article 2, Section 28, Ohio Constitution.

4. The lower courts failed to give full faith and credit to the Judgments of the Supreme Court of the United States, the Supreme Court of Ohio, and said judgment is in conflict with the judgment of other Courts of Appeal of the State of Ohio.

5. Section 713.15, Ohio Revised Code, being a law of general nature, it is lacking in uniform effect throughout the State, in violation of Article 2, Section 28, Ohio Constitution.

6. The lower courts so far deviated from the accepted and usual course of judicial proceedings and ignored mandatory judicial procedures required by Ohio Statute as to call for an exercise of the Supreme Court of the United States authority and power of supervision.

7. Appellants contend the lower courts entered erroneous judgments herein; founded upon laws, legal principles and authorities applicable to unimproved vacant land, and relating to petitioners in the courts for an order that a building permit be issued.

8. Appellants contend adequate proof is apparent on the face of the records herein to show the gravamen of appellee's Zoning Ordinance, No. 2493, of its own force operates unconstitutionally to reduce the value of the land and business property herein involved and destroy its marketability.

9. On page 5, last paragraph, in the trial court decision, in the case of The State, ex rel., Liuex, Appellee, vs. Village of Westlake, et al, Appellants, in which case the Realtor instituted an action in mandamus for a building permit to construct a greenhouse on a residential lot, cited by the court as 154 Ohio State p.412, wherein the facts show the construction of such a building was expressly prohibited by the Zoning Ordinance, and the decision in this case is based on the decision in that case up to a certain point, pages 412 to 416. At page 417 the syllabus reads: "ref. to Village of Euclid vs. Realty Co., 272 U.S., 365, 711, Ed., 303, 47 S. Ct., 114, The Supreme Court of the United States did hold that it

was not necessary for the Plaintiff in that case to exhaust its remedies under the Ordinance before seeking such an injunction." "....the facts do not disclose that this zoning ordinance will operate to reduce the value of Realtor's land or to destroy its marketability." "The general principle that one who invokes the power of the court to declare a Statute or Ordinance unconstitutional must be able to show that he has sustained, or is in immediate danger of sustaining, some direct injury as a result of the enforcement of the legislation." I d., at 1380.

10. In the case of Curtiss, Appellee, vs. City of Cleveland, 1000 (2d) 85, decided in the Supreme Court of Ohio on December 16, 1959, at page 88, third paragraph, the Court gave full faith and credit to the decision by the Supreme Court of the United States hereinabove quoted and on remand to the Court of Appeals, Cuyahoga County, Ohio, 1200 (2d) 415, at page 418, third paragraph, the Court declared: "Wherefore, this court does now adjudge and decree that (144) said amendatory ordinances specified in its former decree herein, were and are invalid and unconstitutional to the extent that they affect the specific properties hereinbefore listed and said City of Cleveland, and all its servants, agents, officers and employees are hereby permanently enjoined from any action or conduct tending to interfere with the use and enjoyment of said premises in the same manner and as to the same extent as they were, or could have been used and enjoyed prior to the adoption of said amendatory ordinances."

11. In the case of the State, ex rel., Stulbarg et al, vs. Leighten, Commr., et al, 1800 (2d) 94, the pertinent part of the decision is as follows: "A zoning ordinance restricting the use of property, if applied retroactively to deny a use of property which was permitted use under a previous ordinance, in contrayention of the due process clauses of the Federal and State Constitutions, is unconstitutional as to such premises." *

*The above case was appealed to the Supreme Court of Ohio and dismissed on application of appellants on October 7, 1959, as a moot question.

12. In the case of State, ex rel., Cubbon, Jr., et al, vs. Winterfield, et al, Board of Trustees, 400 (2d) 407, Court of Appeals, Lucas County, Ohio, a case involving existing non-

conforming residential use, wherein the Respondents had denied lawful use thereof, at page 409, second paragraph, the court declared: "The zoning plan does attempt to regulate an existing non-conforming use except upon discontinuance of non-conforming use for two years or more, which does not apply to the facts in this case. See Section 519.19, Revised Code, and Section 13-B of the zoning plan. The ground for denial to Realtors for occupancy permit therefore stems from an erroneous and false premise. (264) The lawful and continued use of Realtors cannot thereby be disturbed. It may parenthetically be observed that if any such provision in the zoning plan so provided, it would clearly be a patent violation of constitutional rights."

13. Appellants contend the Statutes of the State of Ohio that provide for retroactive zoning controls and the zoning plans containing such provisions are as vicious as an ex post facto statute, and this contention is supported by authorities which clearly show the courts in Ohio have declared such legislation invalid and unconstitutional when the impact of such legislation has caused a decrease in the value of the land or has denied or restricted lawful use of property when such use and occupancy was lawful and permitted prior to the passing of such legislation: i.e., in all cases except this case before the United States Supreme Court.

14. Sections 2309.29 and 2317.44, Ohio Revised Code, require courts of Ohio take judicial notice of the public laws of this State and of the United States, and they should not be pleaded. However, authorities show it is not improper to plead such Statutes. Therefore, the record shows most of the follow- Statutes are contained in appellants' pleadings.

15. The trial court denied a trial by jury in violation of the Constitution of the United States, Ohio Constitution and Section 2311.04, Ohio Revised Code, which provides: *(Pertinent part stated.)* "Issues of fact arising in actions for recovery of money only, or specific real or personal property, shall be tried by a jury, unless a jury trial is waived."

16. The trial court violated Section 2315.20, Ohio Revised Code, which provides as follows: "Jury trial may be waived. In actions arising on contract, trial by jury may be waived by the parties, in other actions with the assent of the court as follows: (A) By consent of the party appearing, when the other party fails to appear at the trial, in person or by attorney; (B) By written consent, in persson or by attorney, filed with the clerk; (C) By oral consent in open court entered on the journal."

17. The trial court violated Section 2315.24, Ohio Revised Code, by ordering and proceeding on a case stated; controversy, without the affidavit filed by the parties as required by said Statute.

18. The Journal Entry filed in the Court of Appeals, Logan County, Ohio, shows the decision rendered by that court in this case as follows: "This matter came on to be heard on the appeal of Harold C. Foreman and Edith L. Foreman, the transcript, Journal Entries and briefs and the court, being fully advised in the premises, finds as follows:

"The court finds sua sponte that purported notice of appeal of plaintiff, Edith L. Foreman, filed February 23, 1962, was not signed by her individually or by any person empowered by law to sign said notice in her behalf. Appeal dismissed as to Edith L. Foreman. Exceptions to said dismissal saved to her."

Section 2307.20, Ohio Revised Code, provides: "Parties united in interest; joinder mandatory."

19. The courts of Ohio have held: Claimants who are united in interest must be joined as plaintiffs. A single cause of action cannot be split so as to permit two or more actions to be brought thereon. That is true whether the cause is owned by one person or several persons. A judgment must effect all parties united in interest.

20. If the aforesaid issue had been properly before the court on the pleading, misjoinder of party plaintiffs, or any other cause, the record clearly shows, plaintiff, Edith L.

Foreman, was not given an opportunity to be heard, or participate in any of the trial proceedings. Therefore, appellants contend the only judgment that could be rendered in accordance with law, legal principles and Judicial Ethics, would remand to the lower court for a fair and impartial trial.

21. In the third paragraph of aforesaid Journal Entry, the court finds as follows: "The court further finds that transcript of docket and Journal Entries shows that the case was tried and heard by the trial court on a stipulation of facts agreed to under date of August 11, 1961, by and between the plaintiff-appellant, Harold C. Foreman, and the defendant-appellee, City of Bellefontaine; and that the said plaintiff-appellant has not filed herein any Bill of Exceptions showing any hearing or trial other than on said stipulations of fact although he has alluded in argument to the same."

Section 2321.12, Ohio Revised Code, provides as follows: "A Bill of Exceptions is not necessary in a case in which the entry of judgment shows that the case was tried on an agreed statement of facts and such agreed statement was filed with the papers in the case."

22. Appellants contend the law hereinabove quoted speaks for itself, that the record shows argument was confined to the Stipulations as to fact, the Proceedings as of August 1, 1961 and other papers filed in the case, and further, that other prejudicial error intervened in rendering said judgment against appellants.

WHEREFORE, it is respectfully submitted that this petition for rehearing on treating the appeal papers herein from the Court of Appeals, Logan County, Ohio, as an application for a writ of certiorari to review the judgment of the Court of Appeals, Logan County, Ohio, should be granted.

/s/ Harold C. Foreman
/s/ Edith L. Foreman

124 East Spring Ave.,
Bellefontaine, Ohio

CERTIFICATE

Your petitioners, Harold C. Foreman and Edith L. Foreman, hereby certify that this petition for rehearing is presented in good faith and not for delay, and this petition is restricted to the grounds herein specified.

/s/ Harold C. Foreman

/s/ Edith L. Foreman